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No. 95-492

In the Supreme Court of the United States

OCTOBER TERM, 1995

ARTHUR DAVID LEMASTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction under 18 U.S.C. 1001 is barred by the "exculpatory no" doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 54 F.3d 1224. The opinion of the district court (App., *infra*, 1a-11a)[1] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1995. A petition for rehearing was denied on July 7, 1995. Pet. App. B. The petition for a writ of certiorari was filed on September 25, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The opinion of the district court was not included in petitioner's appendix, and it is therefore reproduced in an appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of making false statements in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1001. He was sentenced to a one-year term of imprisonment, to be followed by two years' supervised release. The court of appeals affirmed. Pet. App. 1-21.

1. In 1992, while petitioner was the chairman of the Business Organizations and Professions Committee of the Kentucky State Senate, the Kentucky General Assembly was considering horse racing legislation that contained a "breed to breed" provision that would have been financially detrimental to the harness racing industry. The provision had to be approved by petitioner's committee before it could be enacted by the General Assembly. Pet. App. 2-3.

In January 1992, John Spurrier, a lobbyist for the harness racing industry, began cooperating with FBI agents who were investigating allegations of corruption in the Kentucky General Assembly. Spurrier told the agents that he had given petitioner approximately $7,000 in 1990 in exchange for favorable action on pending horse racing legislation and that he and another lobbyist were planning to influence the course of the pending "breed to breed" legislation by offering payments to petitioner and other legislators. Pet. App. 3.

At a meeting on January 27, 1992, Spurrier told petitioner that the harness racing industry was extremely concerned about the "breed to breed" provision and was willing to pay petitioner as much as $5,000 to defeat the proposal. Although petitioner said

that he would not accept money in exchange for his commitment to oppose the provision, he solicited from Spurrier a trip to Florida. The next day, Spurrier invited petitioner to join him on a weekend trip to Florida, with the understanding that Spurrier would reimburse petitioner's expenses. When petitioner arrived in Florida, he informed Spurrier that the cost of his flight there was $906. Spurrier gave petitioner $1,000 and agreed to give him an additional $500 the next day to cover his hotel bill. Pet. App. 3.

Ultimately, a horse racing bill without the "breed to breed" provision was reported out of petitioner's committee and enacted by the legislature. Shortly thereafter, Spurrier gave petitioner $2,500. In the aggregate, petitioner received at least $6,000 from Spurrier through payments made in Florida and Kentucky. Pet. App. 3-4.

Several days later, two FBI agents interviewed petitioner. The agents told petitioner that they were investigating allegations that legislators had illegally received money in exchange for favorable votes on pending legislation and asked petitioner whether he had received "any cash, gratuity, or any other thing of value from anyone" during the trip to Florida. Pet. App. 4. Petitioner said that he had, explaining that he had gone "to the race track" and had "accepted lunch there." *Ibid.* When the agents asked petitioner whether anyone had given him cash during the Florida trip, petitioner answered "No, sir." *Id.* at 5. The agents then asked whether the only gratuity petitioner received was "a day at the races or something to that effect." *Ibid.* Petitioner responded that he also "went out on a boat ride" and that he received "beverages and food" on the boat. *Ibid.* Finally, the agents told petitioner that they had

tape recordings of conversations in which he had accepted cash from Spurrier and asked petitioner whether he "acknowledge[d]" receiving the payments. Petitioner again answered "No, sir." *Ibid.*

2. The district court denied petitioner's motion for a judgment of acquittal, concluding that petitioner's statements were material, and that, even if the judicially created "exculpatory no" doctrine were applied in the Sixth Circuit, petitioner's misstatements did not fall within the scope of the doctrine. App., *infra*, 4a-7a, 7a-10a. The court explained that petitioner's "assertion to the agents was, in essence, 'I received a boat ride and a trip to the race track, but I did not receive any cash.' This assertion was more than a mere 'no.'" *Id.* at 8a-9a.

On appeal, petitioner reasserted his claim that his false statements were shielded by the "exculpatory no" exception to Section 1001. The court of appeals noted that its prior cases had not required it to determine whether to adopt the exception. After examining the facts of this case, the court again reserved that question, because it concluded that the exception was inapplicable here. Pet. App. 8-10.

The court explained that petitioner's "false statements during his interview amounted to much more than merely responding 'no' on two occasions." Pet. App. 10. It noted that petitioner had admitted during the interview that he received certain gratuities during the trip to Florida, including food and beverages, a boat ride, and a day at the races. *Ibid.* Although that listing of gratuities received was truthful, the court explained that "[t]rue responses can constitute a false statement if they represent an attempt to conceal additional information required to provide a complete, accurate and truthful response."

Ibid. Here, the court reasoned that petitioner's "failure to include [the cash payments from Spurrier] in his recitation of the gratuities he did receive" amounted to false statements. *Ibid.* Since petitioner's deception went beyond a simple denial, the court declined to "reach the broader question of when, if ever, the 'exculpatory no' doctrine may apply." *Ibid.*[2]

Judge Jones, in dissent, disagreed with the majority's view that petitioner's selective listing of the gratuities he received constituted false statements, and he would have applied the "exculpatory no" exception in this case. Pet. App. 19-21.

ARGUMENT

Petitioner contends (Pet. 6-10) that this Court should grant review to resolve a conflict among the circuits concerning the validity of the "exculpatory no" exception to Section 1001.[3] Courts that have adopted that exception have held that Section 1001

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[2] The court also rejected petitioner's arguments that his false representations were immaterial, Pet. App. 11-12, and that his "No, sir" responses were not "statements" for purposes of Section 1001, Pet. App. at 10-11.

[3] Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. 1001.

does not apply to simple denials of guilt by the target of a government investigation. See *United States* v. *Moore*, 27 F.3d 969, 978 & n.6 (4th Cir.) (citing cases from the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits that have applied the "exculpatory no" doctrine in some form), cert. denied, 115 S. Ct. 459 (1994). The Fifth Circuit has rejected the "exculpatory no" exception. See *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1045 (1994) (en banc).

As the Fifth Circuit observed in *Rodriguez-Rios*, "[t]he 'exculpatory no' exception cannot be found in the plain language" of Section 1001. 14 F.3d at 1044; cf. *Hubbard* v. *United States*, 115 S. Ct. 1754, 1761 (1995) (interpretation of Section 1001 must "give effect to the plain language" of the statute). Moreover, decisions of this Court make clear that the "exculpatory no" exception cannot be justified by a need to protect the Fifth Amendment right against self-incrimination. As the Court held in *Bryson* v. *United States*, 396 U.S. 64 (1969), there exists no "privilege to answer fraudulently" in response to an official inquiry; "[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Id.* at 72;[4] see also *United States* v. *Knox*, 396 U.S. 77, 82 (1969) (defendant who furnishes false information in tax return because truthful filing would incriminate him "has taken a course * * *

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[4] In *Bryson*, the defendant filed an affidavit with the National Labor Relations Board falsely denying affiliation with the Communist Party. The Court held that so long as the agency was acting within its jurisdiction in requesting the information, the fraudulent reply was punishable under Section 1001. 396 U.S. at 71.

that the Fifth Amendment gave him no privilege to take"); cf. *United States* v. *Wong*, 431 U.S. 174, 179-180 (1977) (witness testifying before grand jury may not lie in lieu of invoking Fifth Amendment privilege; "[i]f the citizen answers the question, the answer must be truthful").

The disagreement among the circuits about the existence of an "exculpatory no" exception to Section 1001 may warrant review in an appropriate case.[5] This case, however, is not suited to that task. As the court of appeals explained (Pet. App. 10), this case offered it no occasion to consider whether to recognize the "exculpatory no" doctrine because petitioner's false statements went beyond a simple "no."[6] In response to the agents' questioning about whether he had received anything of value during his trip to Florida, petitioner listed various gratuities that he had received, including a trip to the race track and various refreshments. When asked in a follow-up

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[5] For many years, the Department of Justice has, as a matter of policy, declined to prosecute cases under Section 1001 involving mere denials of criminal activity by suspects to federal law enforcement agencies. See Memorandum for the United States at 8-9, *Nunley* v. *United States*, No. 77-5069 (filed Nov. 1977). In light of the recent decision of the Fifth Circuit rejecting the existence of the "exculpatory no" exception, the Department suspended its policy and is currently reevaluating the issue.

[6] The "exculpatory no" doctrine does not extend to "misleading exculpatory stories or affirmative statements other than simple denials of the criminal act." *United States* v. *Moore*, 27 F.3d at 979; accord *United States* v. *Barr*, 963 F.2d 641, 645-646 (3d Cir.), cert. denied, 113 S. Ct. 811 (1992); *United States* v. *Capo*, 791 F.2d 1054, 1069 (1986), rev'd in part on other grounds on rehearing en banc, 817 F.2d 947 (2d Cir. 1987).

question whether the day at the races was the only gratuity that came to mind, petitioner said "no," but mentioned only a boat ride. Not only did he fail to disclose that he had also received cash payments, he denied receiving any cash when specifically asked. Under the circumstances, the court below correctly found that petitioner's statements went beyond a mere denial of guilt.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1995

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[7] Cf. *United States* v. *Ali*, No. 94-1600, 1995 WL 619747, at *5 (2d Cir. Oct. 23, 1995) (doctrine held inapplicable where, after falsely denying he was transporting regulated articles, defendant asserted that his luggage contained "some clothing, some liquor, a VCR").

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CRIMINAL ACTION No. 93-6

UNITED STATES OF AMERICA, PLAINTIFF

v.

ARTHUR DAVID LEMASTER a/k/a DAVID LEMASTER,
DEFENDANT

[FILED JAN. 24, 1994]

MEMORANDUM OPINION AND ORDER

* * * * *

The defendant, Arthur David LeMaster, a/k/a David LeMaster [LeMaster], has moved for a judgment of acquittal notwithstanding the verdict. Fully briefed, this matter is ripe for decision.

I.

LeMaster, a Kentucky legislator, was charged in Count III of an indictment with violating 18 U.S.C. § 1001 by making a false statement to the Federal Bureau of Investigation [FBI] during an interview.

Prior to trial, LeMaster moved to dismiss Count III, claiming that his statements to the FBI were not material and fell within the "exculpatory no" exception to § 1001. This Court rejected the motion, holding that the materiality issue was prematurely raised and that the "exculpatory no" exception, assuming the same was available in the Sixth Circuit, did not apply in this instance.

At the close of the government's proof at trial, as well as at the close of all proof, the defendant moved for a judgment of acquittal on Count III based on lack of materiality and the "exculpatory no" exception. In both instances, the motion was rejected.

The jury having found the defendant guilty of the offense charged in Count III, the defendant filed the instant motion.

II.

On March 31, 1992, the defendant was interviewed by two FBI Special Agents as part of an investigation into corruption in the Kentucky State Legislature, primarily relating to allegations that legislators received things of value from lobbyists in return for assistance with legislation. Present with the defendant was Fred Bradley, another State Senator, who seemingly was acting as the defendant's attorney. The defendant is an attorney who has practiced in criminal law. The interview was tape recorded.

At the beginning of the interview, the defendant was told that the FBI was conducting an investigation into alleged illegal payments to legislators. He also was told that he was not required to answer any questions, and could stop the interview at any time. At one point, the defendant halted the interview to

speak to Senator Bradley, who advised him that he was saying too much and volunteering too much information.

Several times during the interview, the defendant was asked whether he offered, or accepted, any things of value during legislation. He was asked about any personal or financial relationship with Jay Spurrier, a lobbyist. At the end of the interview, the agents served grand jury subpoenas on the defendant for financial records, election records, and documents relating to his dealings with Spurrier.

Count III charged the defendant with two false statements: (1) falsely stating that he had not received cash during a trip to Florida in or about January and February 1992, and (2) falsely stating that he had not received cash from Spurrier in Florida and Kentucky during 1992. The first statement was in response to the question, "Did you receive any cash, gratuity, or any other thing of value from anyone on that trip? That's on the trip to uh Fort Lauderdale?" LeMaster named a number of things of value that he received in Florida, but did not mention receiving any cash. To clarify the defendant's answer, the agents asked, "Just to make sure that we have no confusion here, did anyone give you any cash while you were on that trip [to Florida]?" His response was "Give me cash? No, sir." At the end of this line of questioning, the defendant reaffirmed that the only gratuities he had received were boat a trip and a free day at the race track.

The second statement was made near the end of the 1 1/2 hour interview, after the interviewing agent told the defendant that there were tape recordings of him accepting "cash payments from Spurrier, in the amounts of thousands of dollars in Florida, five

hundred dollars in Florida, a thousand dollars in Kentucky. And these amounts may not be all inclusive." As a follow-up to this statement, the agent asked "Do you acknowledge that you received this pay . . . these payments from Spurrier." LeMaster responded, "No, sir."

III.

A.

A statement is material under 18 U.S.C. § 1001 if it, " '[has] a natural tendency to influence, or [is] capable of influencing, the decision' of the agency" regardless of whether the agency's actions ultimately were influenced. *United States v. Chandler*, 752 F.2d 1148, 1151 (6th Cir. 1985) (citations omitted). After hearing the entire tape recorded interview, the Court concluded from the facts and circumstances of the interview that LeMaster's false statements were material to the investigation.

The questions presented are (a) whether there was an ongoing FBI investigation, and (2) whether LeMaster's truthful answers to the interviewer's questions would have had the capability or natural tendency to influence the investigation. *Kunggs v. United States*, 485 U.S. 770, 775 (1988). Both questions warrant an affirmative answer.

The evidence at trial proved there was an ongoing legislative corruption investigation at the time of the defendant's interview, and that the defendant was a subject of that investigation. Special Agent Antle told the defendant at the beginning of the interviewing that the FBI was conducting an investigation into alleged illegal payments to legislators by lobbyists. The defendant was served with two grand

jury subpoenas for his financial records and election records at the end of the interview. It was clear from the contents of the interview that the entire purpose of the interview was to obtain information as part of the legislative corruption investigation, including information about the defendant's relationship with Spurrier.

LeMaster's statements had the capacity and natural tendency to influence the ongoing investigation. *See United States v. Beer*, 518 F.2d 168, 172 (5th Cir. 1975) (recognizing that materiality can be established by circumstantial evidence). Whether LeMaster received money from Spurrier during the legislative session was central to the FBI legislative corruption investigation. Throughout the interview, the FBI agents asked logical follow-up questions to establish relevant facts. One of the obvious purposes of the interview was to determine whether there was an innocent explanation for the payment from Spurrier. Had the defendant offered such an explanation, the FBI would have questioned him about and later atempted th confirm it. If LeMaster had said he received money from Spurrier, a natural result would have been for the agents to ask the defendant the purpose for which he received the money. Similarly, had the defendant said he received money for bets, as his counsel claimed at trial, a natural result would have been for the agents to ask for specifics about the bets. Moreover, had the defendant said he was then holding winning tickets for Spurrier, the agents' natural response would have been to ask for the tickets or copies of the tickets. There is ample evidence from which the Court could, and did, infer that truthful answers to the agents' questions would

have had the capacity and natural tendency to influence the ongoing investigation.[1]

LeMaster makes two principal arguments why his statements were not material: (1) there was no direct evidence that there was an ongoing investigation, and (2) there was no direct testimony about what effect his statements would have had on that investigation. The defendant ignores that the Court can, and did, properly consider circumstantial evidence and draw natural inferences from the evidence in determining materiality.

The defendant asserts that the evidence at trial failed to show an ongoing investigation existed after the interview ended. It is irrelevant whether any investigation actually occurred after the interview, so long as there was an ongoing investigation at the time of the interview that could have been influenced by LeMaster's false statements. For the same reasons, it is irrelevant whether the defendant thought the investigation was over after the interview.[2]

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[1] Similarly, it is irrelevant that there was no evidence that the post-interview investigation was actually influenced by the false statements. The defendant's citation to *United States v. Williams*, 952 F.2d 1504 (6th Cir. 1991), does not support this proposition. *Williams* concerned whether the defendant's sentence should have been enhanced under the Sentencing Guidelines for obstruction of justice because he made material false statements to law enforcement agents. The relevant Guideline enhancement applied only if the false statements *significantly obstructed or impeded* the investigation. Section 1001 contains no such requirement. *Chandler*, 752 F.2d at 1151.

[2] There is no competent evidence that the defendant believed the investigation was over after the interview. LeMaster's only support for this proposition is that Special Agent Antle testified on cross-examination that he thought the defendant thought the investigation was substantially over.

The defendant's false statements were material. They were not the kind of "trivial" statements meant to be excluded from § 1001. *Chandler*, 752 F.2d at 1151 (materiality requirement in § 1001 " 'inorder to exclude trivial falsehoods from the purview of the statute.' ") (citations omitted).

B.

The "exculpatory no" exception does not exist in the Sixth Circuit. *United States v. Steele*, 933 F.2d 1313, 1314 (6th Cir. 1991) (en banc) (declining to apply doctrine to facts presented and declining to decide whether it would apply in other circumstances). LeMaster's statements would not fall within this exception, even if it existed, because the evidence proved that they were knowing, willful, and voluntary assertions made with the intent to deceive the FBI. Moreover, the defendant's statements about what he received in Florida was more than a mere "no," and a truthful answer to either question would not have directly incriminated him.

Where the statement is more than a mere negative exculpatory response, the "exculpatory no" doctrine does not apply. *See United States v. Barr*, 963 F.2d 641, 645-46 (3rd Cir. 1991); *United States v. Capo*, 791

The Court should afford no weight to the testimony about the defendant's state of mind. Special Agent Antle was not competent to testify to what the defendant thought at the time. Although the United States did not object to this question, the Court, in evaluating the evidence to determine materiality, completely discounts this testimony as speculative. In fact, it is incredible that an experienced criminal defense attorney like the defendant, who had just been served with grand jury subpoenas, would have believed the investigation was over at the end of the interview.

F.2d 1054, 1069 (2d Cir. 1986). Even if the statement is a mere denial, the exception does not necessarily apply. *United States v. King*, 613 F.2d 670, 674 (7th Cir. 1980) (affirming § 1001 conviction based on mere denial, rejecting application of "exculpatory no" exception based on facts of case); *Barr*, 963 F.2d 641 (same).[3] The exception does not apply where a truthful answer would not have been directly incriminating, *United States v. Cervone*, 907 F. 2d 332, 343 (2d Cir. 1990), nor does it apply where the person attempts to affirmatively mislead a government investigation. *United States v. Van Horn*, 789 F.2d 1492, 1510 (11th Cir. 1986).

The defendant's statement that he had not received any cash in Florida does not fall within the exception because it was more than a mere "no." He was asked if he received anything of value in Florida. He then described what he received, failed to disclose that he had received cash, and denied receiving cash when specifically asked. The series of questions and answers all were within the framework of the original question, which asked whether the defendant had received any cash, gratuity, or other thing of value. The defendant's assertion to the agents was, in essence, "I received a boat ride and a trip to the race

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[3] The defendant's position is that any mere denial is *per se* not a "statement" under § 1001, and is therefore protected by the "exculpatory no" doctrine. This position has been rejected by other courts. *E.g.*, *King*, 613 F.2d at 674; *Barr*, 963 F.2d at 645047; *United States v. Alzate-Restreppo*, 890 F.2d 1061 (9th Cir. 1989); *see also* Fed. R. Evid. 801 (a) ("A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.").

track, but I did not receive any cash." This assertion was more than a mere "no."

Moreover, the exception does not apply because a truthful answer to the question would not have directly incriminated LeMaster. Merely receiving cash, gratuities, or things of value from Spurrier was not illegal. For the same reason, the defendant's statement that he had not received cash from Spurrier in Florida and Kentucky during 1992 does not fall within the "exculpatory no" doctrine, either.

In addition, neither of the statements charged in Count III fall within the "exculpatory no" exception because it does not encompass knowing, willful, voluntary assertions made with intent to deceive. The "exculpatory no" is a judicially-created exception to § 1001. Although some courts of appeals have justified this exception of Fifth Amendment concepts of self-incrimination and concerns about the broad scope of § 1001, the Sixth Circuit has found both rationales to be baseless. *Steele*, 933 F.2d at 1320-22 (Fifth Amendment not implicated because the defendant has the option to refuse to answer the question; materiality requirement reasonably limits scope of § 1001). The Sixth Circuit Court of Appeals recognized that the elements of the offense and prosecutorial discretion are the only valid mechanisms for limiting the application of § 1001. *Id.* at 1321-22. The Court of Appeals stated that "the principle underlying [the "exculpatory no"] exception is that a simple negative response cannot serve as proof of the requisite knowledge and willfulness required to convict under section 1001 absent affirmative steps by the government to make reporting requirements known." *Steele*, 933 F.2d at 1320 n. 6.

The jury found that the defendant had the requisite knowledge and willfulness to violate § 1001. Therefore, his statements would not fall within the "exculpatory no" exception, even if the Sixth Circuit adopted it. The Court instructed the jury that it could not find the defendant guilty of Count III unless it found that the defendant knowingly, willfully, and voluntarily made an assertion that he knew to be untrue and that was made with the intent to deceive the FBI. (Instruction No. 14). The jury found these elements satisfied beyond a reasonable doubt. Section 1001 requires no more.

As the questions and the defendant's demeanor on the tape recording make clear, his statements were "made in the context of a wide-ranging and discursive interview with agents who had identified themselves. He was not taken by surprise or otherwise cornered into a defensive, ill-considered misstatement." *Cervone*, 907 F.2d at 343. He was aware of his rights and, before the last false statement, aware of the evidence against him. His statements were deliberate, purposeful, calculated, voluntary assertions made with the intent to deceive the FBI. The "exculpatory no" exception does not protect such statements.

IV.

LeMaster's statements were material because they had the natural tendency to influence or were capable of influencing an ongoing FBI legislative corruption investigation. Moreover, even if the "exculpatory no" exception were adopted by the Sixth Circuit, his statements would not fall within that exception. His statements were knowing, willful, voluntary assertions made with an intent to deceive the FBI.

Accordingly, the defendant's motion for a judgment of acquittal notwithstanding the verdict shall be, and the same hereby is, DENIED.

IT IS SO ORDERED this the 24th day of January, 1994.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

U.S. Attorney
Steve Pence
U.S. Probation
Alva A. Hollon, Jr.
Eldred E. Adams, Jr.
1/24/94 sm